IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2206 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

FORWARD EDUCATION TRUST

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 2206 of 2004

MR NV GANDHI for Petitioner No. 1

MR NC SHAH for Petitioner No. 1

Mr.Chauhan, Asst.GOVERNMENT PLEADER for Respondent No. 1-3

MS DAXA R VYAS for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 13/08/2004

ORAL JUDGEMENT

The petitioner has preferred this petition challenging the order, dated 11-29/9/03 passed by the DEO whereby the respondent No.4 is ordered to be absorbed in the petitioner-school as per the impugned order annexure "B".

2. Heard Mr.Gandhi for the petitioner, Mr.Chauhan, Ld.AGP for respondent Nos 1,2 & 3 and Ms.Vays for respondent No.4.

3. Upon hearing the parties, it appears that there is no dispute on the point that the respondent No.4 was initially appointed in the petitioner school and thereafter on account of closure of the classes he was declared as surplus. There is also no dispute on the point that though the respondent No.4 was declared surplus and permission for closure of classes was granted, one of the conditions was that as and when the permission to open additional class is given, the respondent No.4 shall be absorbed by the school management. There is also no dispute on the point that subsequently the petitioner trust has obtained permission to open new class and the respondent No.4 is not absorbed.

4. Mr.Gandhi, Ld.advocate for the petitioner submitted that the respondent No.4 is not fulfilling the requirements for teaching Psychology subject and therefore if the respondent No.4 is permitted to be absorbed consequently it may result into adversely affecting the quality of education in the school. Ms.Vyas for respondent No.4 submitted that as such when the permission to open new class is given, it was for the petitioner to reabsorb the respondent No.4 but the said vacancy qua the respondent No.4 is filled up by the petitioner institution by giving regular appointment without NOC and the proposal has been forwarded to DEO for regularisation of other irregular appointments. She submitted that therefore if the matter is considered excluding the regular appointments made by the petitioner it can not be said that the respondent No.4 is not holding necessary qualification keeping in view the additional class, quantum of work load and availability of teachers and further staff who are regularly appointed. She also submitted that inspite of the impugned order passed by the DEO and subsequent order for withholding of grant, no action is taken by the authority further and the respondent No.4 is working at DEO's office though he is interested to discharge his duties as teacher in the petitioner school.

5. Mr.Chauhan, the Ld.AGP has supported the order passed by the DEO.

6. In the above circumstances, it appears that as per the condition for re-absorption of the respondent No.4 while declaring the respondent as surplus at the time when the classes were closed, it is the duty of the petitioner to reabsorb the respondent No.4 and thereby to comply with the said condition. Whether such post of the teacher was arising on account of opening new class is filled up by regularly selected person or another is not clearly transpiring from the record of the case, of course statement is made in the affidavit in reply filed by the respondent No.4, but no documentary record is produced. Therefore, it will be for the DEO to examine the same as to whether the post over which the respondent No.4 was to be absorbed by the petitioner is filled up by any irregular appointment and if such is the case, then the right of the respondent No.4 can not be allowed to be frustrated and the irregular appointment which is not having prior sanction can not be allowed to operate over the legitimate right of the respondent No.4. But at the same time if such irregular appointment relates to the post other than the post over which the respondent No.4 has right to be absorbed, it will be for the DEO to examine independently as to whether such irregular appointment can be considered for the purpose of regularisation or not in accordance with law.

7. As per the decision, dated 9.10.03 of this court in the matter of Atladara Kelvani Mandal & Ors vs State of Gujarat & Ors in SCA No.1065/02 and allied matters, while considering the question for ordering the absorption of surplus teachers, the concerned authority has to keep in mind that the teacher who is ordered to be absorbed possesses requisite qualification and if there are more than one teacher available for such absorption, option may be given to the institution to make choice therefrom. In the present case the later portion may not be required as one of the conditions was giving right to respondent No.4 when he was declared surplus, but, at the same time, on the aspect of maintaining the quality of education and as to whether the petitioner is possessing the qualification for the concerned post is concerned, the same can not be allowed to be sacrificed. In case the respondent No.4 is not holding the necessary qualification and the DEO finds for such purpose, it will be for the DEO to post the respondent No.4 at a different school, but, if such is not the case and the post is filled up by irregular appointment by the petitioner

school such irregular appointment can not be allowed to operate over the legitimate right of the respondent No.4.

8. In view of the above, I find that the following directions shall meet with the ends of justice:

(i) The DEO, Mehsana, i.e. respondent No.3 herein, shall examine the matter in the light of the observations made by this court hereinabove and shall decide, within a period of one month from the date of receipt of writ of this court, as to whether the respondent No.4 is required to be absorbed by the petitioner school or not.

(ii) If, as an outcome of such inquiry, the DEO finds that the respondent No.4 is to be absorbed by the petitioner, the petitioner school shall absorb the respondent No.4 and in case such a direction is not complied with by the petitioner school, it would be open to the DEO to withhold the grant of the petitioner school in accordance with law.

9. Petition is allowed only to the aforesaid extent. Rule is partly made absolute . In the facts and circumstances there shall be no costs.

13.8.04 (JAYANT PATEL,J)